STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATINA D. HARRIS,

Defendant-Appellant.

UNPUBLISHED
May 7, 1999

No. 208817
Wayne Circuit Court
LC No. 97-003757

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony (hereinafter "felony-firearm"), MCL 750.277b; MSA 28.424(2). Defendant was sentenced to four years of probation for the two felonious assault convictions and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred by imposing consecutive sentences. This Court reviews the legality of a trial court's imposition of sentence for an abuse of discretion. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995).

During sentencing, the trial judge sentenced defendant to four years' probation for the felonious assault convictions and two years in prison for the felony-firearm conviction. The probation sentences and the prison sentence were to be served concurrently. However, the original judgment of sentence indicated that the probation sentences were to run *consecutively* to the prison sentence. Defendant filed a motion in the trial court for resentencing, which the trial judge granted and entered an amended judgment of sentence. The amended judgment of sentence properly states that all sentences are to run concurrent to each other. Because the judgment of sentence has been corrected, defendant's first issue on appeal is moot.

Next, defendant contends there was insufficient evidence to convict defendant of felony-firearm and felonious assault. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the

prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery." *People v Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991). Defendant claims on appeal that there was no evidence that defendant had a dangerous weapon or that she had an intent to injure or place anyone in reasonable apprehension of an immediate battery.

In *People v Crook*, 162 Mich App 106, 107-108; 412 NW2d 661 (1987), this Court held that when the defendant was witnessed pointing and firing a gun at the complainant, there was sufficient evidence of felonious assault. In *Crook*, seven eyewitnesses testified that the defendant appeared at the complainant's house with a gun and fired it at the complainant. *Id.* at 107. Similarly, in this case, three of the victims testified that defendant pulled out a gun, pointed it at one of the victims and then shot it into the air. Additionally, all three testified that defendant fired two shots at the car, ran through a vacant lot and fired three more shots at the car. All three witnesses also heard the shots hit the car. The police retrieved six .380 semi-automatic live rounds from defendant's shirt pocket when she was arrested. Defendant claims on appeal that the testimony of the witnesses is not credible. However, this Court should not interfere with the trial court's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514-515; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This evidence, when viewed in the light most favorable to the prosecution, was sufficient to convict defendant of felonious assault.

Defendant also claims she was denied effective assistance of counsel when her trial attorney did not respond to her letters, was unprepared for trial, waived the preliminary exam, and did not call defendant to testify at trial. We disagree. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that the errors denied the defendant a fair trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995).

Defendant first claims that her attorney was unprepared and ignored her letters and questions. There is no evidence of defendant's counsel's unpreparedness. Moreover, there is no evidence that defendant's counsel ignored her letters or questions. Defendant seeks to expand the record on appeal by attaching defendant's affidavit to her brief on appeal. However, because defendant did not raise the issue of ineffective assistance below by moving for a new trial or an evidentiary hearing, this Court's review is limited to the facts contained in the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Because there is no evidence that defendant's counsel was unprepared, it is impossible to determine if defendant was prejudiced by the alleged lack of preparation.

Defendant also contends that her counsel erred by resting without calling her to testify. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.* at 538. That a strategy does not succeed does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

The decision not to call defendant as a witness was one of trial strategy that we will not second-guess. Further, even if evidence existed that the strategy was not successful, there is no evidence that it deprived defendant of a substantial defense.

Finally, defendant claims that her counsel was ineffective because she waived the preliminary examination even though the two complaining witnesses were not present. There is no evidence indicating what prompted the waiver. Regardless, defendant has not shown that she was prejudiced by the waiver. In *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990), the Michigan Supreme Court held that a deficiency at the preliminary examination should not require vacating a conviction unless defendant was prejudiced by the error at trial. *Id.* at 600-601. While the issue here is the waiver of the preliminary examination and not a deficiency, defendant still must show she was prejudiced. We find no prejudice here and the evidence at trial was sufficient to convict her of both offenses.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck